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Dear Ed,

**Ofcom annual plan – response to the call for inputs 2015/2016.**

This is Three's response to Ofcom's call for inputs into its 2015/2016 Annual Plan. We welcome this opportunity to inform Ofcom's programme of work for the forthcoming year.

Ofcom's Annual Plan is of key importance to providers in the communications sector, as it enables operator and service providers to understand the policy and regulatory landscape for the year ahead. This enables us to plan and allocate the necessary resources to support upcoming work in priority areas.

The publication of the Annual Plan and the consultation process that underpins it has some clear benefits and is an important step towards greater regulatory accountability. However, we would note that this benefit is tempered by a lack of effective mechanisms for holding Ofcom formally to account on the progress it makes on its proposed work-plans. The lack of specificity in relation to timings and objectives (as opposed to outcomes) in the Annual Plan also inhibits appropriate scrutiny. Three has commented on this in responses to previous Annual Plans.

Specifically, the lack of clear objectives and timelines are a particular problem for businesses, as it can make it difficult to allocate the required resource without compromising our own. This means the process of regulation and reform is not as effective as it might otherwise be. It also

makes it harder for industry and policy-makers to hold Ofcom to account, as there is not a clear delivery target for each priority area.

### Annual Plan for 2014/2015

Before discussing what we believe should be the priorities in Ofcom's Annual Plan for 2015/2016, we would first like to comment on the progress made by Ofcom to meeting its objectives for 2014/15, and congratulate Ofcom on a number of successes so far, including:

- **Work to take forward reform of switching processes:** The complex and differing switching processes across the communication sector inhibit competition and are a major cause of consumer harm. We therefore welcome the recent call for inputs published in July this year, which we hope is a first and decisive step towards the introduction of simpler and easier switching processes for all communication consumers.
- **Progress on the release of future spectrum:** The release of more spectrum is crucial if the UK mobile market is to meet the growing data demand. We therefore welcome the progress made in this area although, as discussed below, we believe that more work is needed to ensure that future spectrum releases maintain the competitive benefits that have flowed from previous auctions. Particularly in relation to future releases and sales of low frequency spectrum/spectrum with low frequency characteristics.
- **Intention to tackle issues in the backhaul and transmission markets through the Business Connectivity Market Review (BCMR):** As the demand for mobile data grows, and as there is increasing demand from consumers and policy-makers for greater mobile coverage, mobile operators need access to sufficient backhaul services. Steps must be taken to inject competition into the transmission market, which is currently dominated by a single player. The Business Connectivity Market Review is a step in the right direction, but must be broader in scope if it is to be effective.
- **Mobile Termination Rates (MTRs):** Three has campaigned to reduce termination rates and therefore we welcome Ofcom's work this year for further reductions. Ofcom's work on MTRs demonstrate the regulator working at its best, tackling the distortions that prevent effective competition, which as a consequence enables better consumer deals.
- **Non-Geographic Numbers:** Three has supported Ofcom's continued work in the area, including the published decision to make 0800 numbers free to call from mobile.

- **Transparency:** We welcome Ofcom's focus on transparency, particularly recent work on mobile unlocking and mobile broadband speeds. Yet we still have concerns, addressed later in this submission, at the way some of this work has been undertaken. Work on transparency has focussed on addressing specific outcomes (such as RPI), rather than taking a more holistic approach to ensuring the consumers are properly informed and empowered.

Transparency should ensure consumers are better informed and therefore able to make better choices. This will help ensure a competitive level playing field and ensure that hidden charges, or partial information in relation to services do not distort the market. It is this principle that action to promote transparency should support; micro-management of consumer outcomes risks eroding the ability of operators to differentiate and effectively compete.

We also note the work that Ofcom has done to maintain fair and open competition in communications, including work on international roaming and the wider connected continent package.

Priorities for the upcoming year.

Many elements of the UK mobile market are highly competitive; this has helped deliver the best value mobile telephony in Europe.<sup>1</sup> However, bottlenecks still exist and these need to be urgently tackled if UK consumers are to continue to enjoy the benefits that should flow from a competitive market. As is acknowledged in Ofcom's statutory duties, competition has a key role to play in securing optimal outcomes for consumers. Therefore, policy proposals in relation to consumer issues should be taken forward with policies to promote competition and should not be considered separately.

Existing competitive bottlenecks have two key impacts:

1. They distort fair and open competition and prevent the proper functioning of the market, stopping consumers from exercising proper choice and benefiting from the best priced deals.
2. They inflate costs for operators, preventing the improvement of enhanced mobile coverage and network extension, as well as reducing an already low return on capital investment.

It follows that good regulation, and a regulator that is capable of making strategic interventions, is necessary if the mobile market is to continue to grow and deliver on policy objectives around economic growth, as well as to work well for UK consumers.

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<sup>1</sup> Source: Ofcom Cost and Value of Communications Services in the UK, January 2014

Three, as the challenger, has identified the following four priorities:

1. **Mobile Spectrum:** continue the efficient release of spectrum to the benefit of UK citizens, in line with the objectives set out in the Government's Spectrum Implementation Strategy.
2. **International Roaming:** ensure that any new regulations that aim to tackle the retail cost of international data roaming, also address wholesale data roaming rates and limit the amount that foreign networks can charge the customer's home network for carrying data.
3. **Switching:** introduce fast, simple and easy switching for mobile consumers.
4. **Transmission:** action is taken to promote increased competition in the transmission market, enabling it deliver the best possible value, coverage and to meet the future data needs of customers.

Each of these priorities are discussed in more detail below:

### **1. Mobile spectrum: ensuring fair and open competition.**

Spectrum is a valuable and finite national resource, necessary for the transmission of mobile data, as well as other key services that underpin the UK's digital economy. The structure of previous spectrum auctions and sales has been successful in promoting and maintaining competition. However, to ensure that UK consumers continue to enjoy the benefits that have flowed from competition, we ask that Ofcom make a clear commitment in its annual plan for 2015/2016 to maintain fair and open competition in future spectrum sales. This must include caps on total and low frequency spectrum holdings.

Following the imposition of only limited caps in the 2014 auction, both for total spectrum and low frequency, the UK now has the second most uneven distribution of spectrum in Europe,<sup>2</sup> as incumbents inevitably bought spectrum up to the cap levels. If caps are not imposed in future sales one or two operators could be left with or reinforce an unmatched advantage in terms of speed and capacity, which would further undermine competition and increase consumer harm.

In the US competition has been stifled by an uneven distribution of low frequency spectrum. As a consequence US consumers pay three times the amount for mobile services than their UK counterparts do.<sup>3</sup> The US Government is now seeking to change their policy for future spectrum sales to take into account competitive outcomes.<sup>4</sup> It is crucial that the UK does not jeopardise the competitive benefits secured in previous auctions and that the UK Government and Ofcom take heed of this lesson.

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<sup>2</sup> Source: Cullen International (Western Europe).

<sup>3</sup> Source: Ofcom International Communications Market Report (2013), figure 1.13.

<sup>4</sup> Source: FCC Adopts revised mobile spectrum holdings policies to preserve & promote a competitive wireless marketplace (2014).

To preserve the fair and open competition so carefully nurtured in previous auctions, there must be a **new commitment to fair and open competition in the UK spectrum market**, manifest in each of the three spectrum sales currently being managed by Ofcom,<sup>5</sup> particularly the sales of 700MHz and 1400MHz.

In its work on spectrum for 2015/2016 Ofcom should confirm spectrum caps, both for total amount of spectrum and amount of low frequency allowed, at the same level as the 4G auction in 2013 (adjusted to reflect spectrum acquired). This will tackle the current distortion in spectrum holdings, as it will preserve the scope for non-incumbents to purchase spectrum and rebalance the market. It will also help ensure that this valuable national resource is used efficiently.

## **2. International Roaming: addressing wholesale data roaming rates.**

The European Commission is considering new regulation of roaming charges at the retail level. As Ofcom is aware, Three fully supports the Commission's objective and we have long campaigned for lower roaming charges. Last year we launched our Feel At Home proposition, which is now available in 16 destinations including France, Italy, Australia and USA. Three's customers are able to use their voice, text and data allowance in these jurisdictions just as they would at home.

However, our concern is that the current draft of the regulations do not adequately address reform of wholesale roaming charges. Without this, the Commission will be handing a significant advantage to larger, incumbent operators undermining competition in the UK market and diminishing the consumer benefit that vibrant competition could generate.

This is a real problem for challenger networks like Three, who have only a small number of sister or potential partner networks, and cannot access the European wide volume discounts open to the biggest operators. Failing to tackle wholesale rates will mean that challenger operators will have no means of controlling what foreign networks charge us when our customers use their phones abroad. This will hand a huge competitive advantage to the largest operators.

Ofcom has worked hard with providers, Government and with European bodies to ensure that the competitive impacts of this measure are understood. This has included ensuring that reductions in wholesale rates are properly considered. As policy makers move to implement new roaming regulation, Ofcom must work effectively with partners in Government and BEREC to ensure a significant reduction in the wholesale cap, to levels currently achievable in the most competitive markets, underpins the realisation of this objective.

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<sup>5</sup> For the Qualcomm 1400MHz (L-band), ex-Ministry of Defence (2300/3400MHz) and Broadcast 700MHz.

We welcome Ofcom's work so far in this area as a member of BEREC. However, due to the potential consumer harm if the regulations were to be implemented as currently proposed, we would expect further activity in this area to be a priority in Ofcom's Annual Plan.

### **3. Switching: Simpler and easier switching needed across the communication sector.**

While we recognise that Ofcom have released a call for inputs in their switching review, we do believe that sorting the switching process across the communication sector must be a priority for Ofcom during 2015/16, particularly in mobile where consumer harm is especially acute (see below).

Simple and easy switching processes should underpin the competitive health of our communications market. However, current switching processes work against consumers, and distort fair and open competition.

We support the objective of introducing a Gaining Provider Led system across all market sectors in the communication sector. Consumers have already benefited from switching reforms in other key sectors, most notably the banking and energy. Although some progress has been made in certain market segments of the communications sector, more needs to be done to ensure that all switching processes are Gaining Provider Led.

Not only are the current switching regimes in the communication sector an inconvenience, but they are a cause of real consumer harm. Millions of UK mobile customers choose not to switch every year, as they fear the problems of switching, including the hassle of lengthy conversations with their old provider. Of the 9 million UK customers who enter the switching process, as many as 1.2 million end up being double billed or losing service.<sup>6</sup> Additionally, the mobile switching system enables operators to engage in poor retention practices which increase prices and make it difficult for consumers to compare deals across the market.

While Three appreciates that the mobile switching process is in some formal respects better than that in other communications sectors, the value, importance and level of churn in mobile phone contracts means that the consumer impact of its failures and potential of its improvement is magnified. Reform cannot be ignored on the basis of sector comparisons alone.

Three believes that Ofcom should state in the annual plan that introducing Gaining Provider Led switching is a priority, and set out a clear timetable to show how it will be introduced across all the segments of the communications sector by 2017.

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<sup>6</sup> Source: Ofcom's 2013 Consumer Retention Survey

#### **4. Transmission: Competition urgently needed to help support the UK's data demand.**

In order to transmit mobile data traffic across our network, each mobile site needs sufficient capacity backhaul. In order to meet the future capacity required by UK consumers, sites increasingly need access to fibre Ethernet backhaul. Without this, there is a real risk that customers will become frustrated by bottlenecks and traffic slowdowns. For operators there is an endless cycle of capacity upgrades which are needlessly expensive and slow given the limited infrastructure changes sometimes required.

Mobile operators lease their backhaul lines from Internet Service Providers (ISPs). BT is the dominant provider of these leased lines, while other providers such as Virgin have a much smaller reach. Indeed, Ofcom's last Business Connectivity Market Review found that there is only a choice of two or more leased line providers in 8% of postcodes,<sup>7</sup> with choice concentrated in large urban areas. This fundamental lack of competition is failing to deliver best value, putting the ability of networks to meet the future data needs of customers at risk.

Urgent action is needed to promote competition in this market and offset BT Wholesale's cost and reach advantage, as well as certain aspects of its commercial and technical practices. The upcoming Business Connectivity Market Review is an important opportunity to specifically review the market for mobile transmission services and to improve competition and lower the cost of leased lines, particularly in rural areas. For example, Passive Infrastructure Access, which would force BT Openreach to open up its ducts to other Internet Service Providers, would allow competitors to use their dark fibre. Such a measure will lower the barrier to entry and promote competition, helping to deliver the best value and service to consumers.

#### **Consumer Issues**

While unblocking the competitive bottlenecks explained above will create positive consumer outcomes and tackle many consumer harms, we also recognise that on occasion there is a case for consumer focused interventions. For example, Three has welcomed the work on Next Generation Text Relay (NGTR) and Video Relay Services (VRS).

Three has also supported interventions that promote transparency, recognising that some consumer measures have been necessary to remedy a lack of trust across communications providers. Remedying this is the responsibility of both industry and the regulator. Ofcom's research into phone unlocking and mobile broadband speeds are good examples of how a focus on transparency can better equip consumers to understand the detail of this service offer and make informed choices. These two work-streams represent best practice in terms of how the regulator should drive transparency, and as a consequence further stimulate vibrant competition.

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<sup>7</sup> Source: Ofcom Business Connectivity Market Review Statement (2013).

However, in supporting transparency Ofcom must be cautious in its use of data, ensuring that source information is genuinely comparable and that comparisons between operators reflect and address nuances in the market or are otherwise suitably contextualised. For example, 4G coverage comparisons are important but must also be seen in the context of availability. Three's customers all get 4G, whereas other networks technical availability may be greater, their 4G offer remains commercially unavailable to a significant proportion of their base.

It is our view that the Ofcom annual plan for 2015/16 should include specific commitments to take forward work in a number of consumer facing areas. These are:

1. **Clarity on dispute and complaint handling as understood under GC14:** Ofcom's ongoing work on GC14 has revealed a number of industry issues with complaint handling processes. We are concerned that this work is addressing only the symptoms rather than the cause of these issues, namely that the definitions of "complaint" and dispute in the provisions of GC14 are vague. Therefore, we call on Ofcom to engage in an industry wide debate on what is understood by these concepts.
2. **A net neutrality framework which fosters marketplace competition and innovation for consumers:** Ofcom is responsible for ensuring the effective functioning of the telecoms market in the UK together with HM Government, and industry through the Broadband Stakeholder Group. Given its role in helping to inform and shape policy proposal at a European level, Ofcom should work with EU counterparts to develop a net neutrality framework that continues to allow MNOs to manage their networks efficiently to reduce costs and increase performance, while avoiding closing down future innovations in the name of precluding unproven risks (at least in the UK market). Ofcom should ensure that regulatory intervention should be light touch and only occur to prevent anti-competitive bottlenecks from being created.
3. **Cross regulator join up on consumer issues:** Past occasions have arisen where a regulator dealing with consumer protection issues cut across issues which Ofcom was involved in. Ofcom should endeavour to have better join up with other regulators or bodies who have consumer protection responsibilities which may overlap with it. This would include the CMA, the ASA and Trading Standards. The highly technical and dynamic nature of the telecoms market requires a consumer protection body who understands the marketplace. Consumer protection issues in the telecoms market cannot necessarily be effectively advanced by a regulator who is a generalist.

However, beyond these issues, we have concerns at the way in which some work in the consumer field is undertaken by Ofcom. For example, it was deeply concerning that during its work on call-drop data, Ofcom was initially insistent on using and publishing non-comparable data sets. This undermines the role of Ofcom and leads to concerns that such actions could



become part of a trend. Not only does this distort the true picture of operator's situations but ultimately has the potential to mislead consumers.

As have been set out in previous responses, we remain concerned that Ofcom can take a highly reactive stance on consumer issues, leading to unnecessary interventions in market outcomes rather than correcting inherent market flaws that led to those outcomes. This inhibits the ability of operators to differentiate which in turn limits the ability of challengers to drive competition through innovative new offers. For example Three, through consumer propositions such as All You Can Eat Data, Feel at Home, 4G at no extra cost and free calls to 0800 numbers, have identified and addressed consumer harms such as bill shock. This is how the market should work, without recourse to regulatory interventions to dictate consumer outcomes. If left unchecked, could lead to a situation such as that in the energy market, where there is limited consumer choice in terms of differing offerings.

Instead, Three believes that Ofcom should spend greater resource on ensuring a fair, competitive and open market. As a consequence, many of the consumer issues that they seek to resolve through regulatory intervention would be addressed through positive differentiation in the market.

### Vision

While we have highlighted Ofcom's recent successes, we still believe that the communication market is disadvantaged by a lack of strategic vision from its regulator. As we set out above, this not only means that industry cannot plan or allocate resources with certainty, it also creates an atmosphere where policy is reactionary and when there is a tendency to intervene unnecessarily in market outcomes rather than correct the market flaws that led to those outcomes.

We believe there is a need for a clear for Ofcom to have vision in both competition and consumer spaces covering a number of years. Therefore, we suggest that Ofcom's plans could be more forward looking than a single year. A five-year plan, setting out clear objectives for what the regulator wants to achieve (including timescales), which is regularly reviewed would better suit the communications sector and provide greater business certainty. It will also provide a strategic framework in which operators can innovate and work towards regulatory objectives without expensive and disruptive formal processes.

This plan should be supplemented by a new way of working within Ofcom, which prioritises informal and strategic engagement between regulator and operators, with meetings occurring between them on a more regular basis. Currently outside the formal process of consultation, Ofcom too often engages through increasingly burdensome Section 135 information requests. Often the first we will be aware of an issue is through such an information request. Issues could be more quickly identified and resolved if there were earlier engagement that enabled

the more accurate scoping of information requests. This would also create the opportunity for industry to engage in problem solving with Ofcom rather than issues being resolved on a time and resource hungry and, often by nature, adversarial process. We recognise, of course, that Ofcom must remain independent. However, it is our firm belief that engaging positively and constructively with industry could be done professionally without creating bias or a lack of independence. Above all, we believe that this could enable faster more efficient reform and remedy of competitive and consumer harms.

Yours sincerely,

Stephen Lerner  
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